

EDWARD H. KUBO, JR. (#2499)
 United States Attorney
 District of Hawaii
 R. MICHAEL BURKE (#1902)
 Assistant U.S. Attorney
 Room 6-100, PJKK Federal Building
 300 Ala Moana Blvd.
 Honolulu, Hawaii 96850-6100
 Telephone: (808) 541-2850
 Facsimile: (808) 541-3752

PETER D. KEISLER
 Assistant Attorney General
 Civil Division
 C. FREDERICK BECKNER, III
 Deputy Assistant Attorney General
 J. PATRICK GLYNN
 Director, Environmental Torts
 DAVID S. FISHBACK
 Asst. Dir., Environmental Torts
 STEVEN M. TALSON
 Senior Trial Counsel, Envir. Torts
 TIMOTHY B. WALTHALL
 Trial Attorney, Environmental Torts
 U.S. Department of Justice
 P.O. Box 340
 Washington, D.C. 20044
 Telephone: (202) 616-4229
 Facsimile: (202) 616-4473
 E-mail: steven.talson@usdoj.gov
 Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF HAWAII

IN RE
 HAWAII FEDERAL ASBESTOS
 CASES

This Document Applies To:

MERCY S. BYINGTON, individually
 and as Personal Representative of the
 Estate of JIMMY F. BYINGTON,
 deceased, EVELINE SHORT, and
 BEVERLY ANN HAUOLI ANI, as
 Prochein Ami for MARGARET
 BARBARA HA'EIHA'E ANI, a
 minor,

Plaintiffs,

vs.

CIVIL NO. 04-00661 REJ-BMK

DEFENDANT UNITED STATES OF
 AMERICA'S NOTICE OF MOTION
 TO DISMISS PLAINTIFFS'
 COMPLAINT, OR IN THE
 ALTERNATIVE, FOR SUMMARY
 JUDGMENT, AND
 MEMORANDUM IN SUPPORT;
 CERTIFICATE OF SERVICE

1 UNITED STATES OF AMERICA,)
2 Defendant.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM IN SUPPORT OF DEFENDANT UNITED STATES OF**
2 **AMERICA'S MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR**
3 **SUMMARY JUDGMENT**

4 Defendant United States of America moves to dismiss Plaintiffs' Complaint
5 for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or in the
6 alternative, for summary judgment pursuant to Fed. R. Civ. P. 56, on the ground
7 that Plaintiffs' claims are jurisdictionally barred by the applicability of the
8 discretionary function exception to the limited waiver of sovereign immunity under
9 the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

10 **INTRODUCTION**

11 In a complaint filed against the United States pursuant to the FTCA on
12 November 9, 2004, Plaintiffs seek money damages for the alleged wrongful death
13 of Jimmy F. Byington (Mr. Byington) on June 27, 2002. Complaint ("Compl.") at
14 2-3. Plaintiffs allege that Mr. Byington was exposed to asbestos at various times
15 and locations throughout his life (see Answers to Interrogatories filed in state court
16 action, at pp. 1-3, Exh. C to Plaintiffs' Compl.), including exposure in the course
17 of Mr. Byington's lifelong hobby of working on asbestos-containing automobile
18 brakes and engine gaskets. Id. at p. 3. That asbestos exposure is the basis for
19 Plaintiffs' state court suit against numerous private defendants in In Re: Hawaii
20 State Asbestos Cases, Civil No. 02-1-1533-06 (Cir. Ct., 1st Cir., Hawaii).

21 The basis for Plaintiffs' federal claims in the instant suit is the allegation that
22 Mr. Byington was exposed to asbestos in "Buildings 3400B, 3427, 3426, 3415 and
23 others" at Hickam Air Force Base ("Hickam AFB"), Hawaii, from approximately
24 1989 to 1993. Compl. at p. 4, ¶ 6. During the relevant time alleged in Plaintiffs'
25 federal suit, from November 6, 1989, to 1993, Mr. Byington was employed by the
26 state of Hawaii as a laborer for the Hawaii Air National Guard (HIANG), at
27 Hickam Air National Guard (Hickam ANG) base, located on a part of
28

Hickam AFB. U.S. Exh. A. Mr. Byington was not a federal employee.¹ (Compl. at 2-3 & Compl. Exh. C at 2.). Significantly, the buildings in which Mr. Byington worked at Hickam AFB were licensed by the United States Air Force (USAF) to the State of Hawaii, for use by the HIANG. See, U.S. Exh. B, USAF-HIANG Lease of November 13, 1975, USAF 01-00001-00012.²

Plaintiffs state two claims of negligence against the United States: (1) negligently permitting "dangerous and defective asbestos products to exist" in Buildings 3400B, 3427, 3426, 3415, and others, at Hickam AFB; and, (2) negligently failing to provide decedent with a "safe place of employment." Compl. at ¶ 8.

As shown below, by virtue of the arrangements made between the USAF and the HIANG, all responsibility to manage the asbestos in the buildings licensed to the HIANG, and to provide HIANG state employees with a "safe place of employment," rested with the HIANG (Mr. Byington's employer), and not the United States. Plaintiffs' suit effectively challenges discretionary decisions made by the United States in leaving responsibility for maintenance and safety of the licensed premises to the HIANG. It is well settled that where the United States decides to allocate such matters to either a contractor or, as in this case, a non-

¹ The question of whether an employee of a state National Guard is a state or federal employee only affects military members of the guard, and not civilian employees such as Mr. Byington. Even military members, except when called to federal duty or in limited circumstances not applicable here, are deemed state, not federal, employees. See Maryland v. United States, 381 U.S. 41, 48 (1965); California National Guard v. Federal Labor Relations Authority, 697 F.2d 874, 877 (9th Cir. 1983).

² In a Minute Order dated April 27, 2006, this Court allowed the parties limited discovery on sovereign immunity issues. In response to Plaintiffs' requests for document production, the United States provided copies of Air Force records bates-stamped as USAF 01-00001 to 01-00963. Relevant copies of documents from that production are attached hereto as exhibits, and the USAF bates-number of each document is provided for ease of reference. As the declarations of the records custodians who produced the documents make clear (see U.S. Exh. C, USAF 01-00947-00953), these documents were taken from official Air Force files, maintained in the ordinary course of business, and therefore, are exempt from hearsay exclusion pursuant to Fed. R. Evid. 802 (6), (8).

1 federal entity such as the HIANG, that delegation may not be challenged through
2 means of a tort suit, and it is exempt from judicial review by the applicability of
3 the FTCA's discretionary function exception, 28 U.S.C. § 2680(a). Accordingly,
4 this case should be dismissed for lack of subject matter jurisdiction pursuant to
5 Fed. R. Civ. P. 12(b)(1), or in the alternative, summary judgment should be granted
6 pursuant to Fed. R. Civ. P. 56.

7 **STATEMENT OF FACTS**

8 **A. The Premises at Issue Were Licensed to Mr. Byington's** 9 **Employer, the Hawaii Air National Guard**

10 Hickam AFB is a federal facility owned by the Department of Defense. U.S.
11 Exh. B at p. 1. Mr. Byington was employed by the State of Hawaii at all times that
12 he worked in HIANG facilities on Hickam AFB. Compl. at ¶ 12, U.S. Exh. A. It
13 is indisputable that Mr. Byington's alleged exposure to asbestos at Hickam AFB
14 occurred, if at all, in buildings 3400B, 3427, 3416, 3426 and 3415, Compl at ¶ 6,
15 and that all of these buildings were licensed to decedent's employer – the HIANG
16 – for use by the HIANG at all times relevant to this claim. U.S. Exh. B at pp. 1-10;
17 U. S. Exh. D, Declaration of Ms. Lei Lum, ¶¶ 4-6.

18 The initial licensing agreement between the USAF and the HIANG for use
19 of Hickam AFB facilities was executed in November 1975, and continues in effect
20 today. Id. The Air Force has express statutory and regulatory authority to license
21 buildings to the Air Guard. See U.S. Exh. D, Declaration of Ms. Lei Lum, ¶ 5,
22 U.S. Exh. G. During the relevant time asserted in Mr. Byington's federal
23 complaint - - from 1989 to 1993 - - the terms of the November 1975 license
24 agreement controlled the allocation of responsibility for maintenance of the
25 facilities, and safety of employees. Id.

26
27
28

B. The Premises at Issue Were Maintained by the Hawaii Air National Guard Pursuant To Licensing Agreements With The USAF

The USAF-HIANG licensing agreement in effect during the time in which Mr. Byington worked for the HIANG imposed upon the HIANG responsibility for the maintenance and repair of the licensed premises. See U.S. Exh. A, USAF-HIANG License Agreement dated November 11, 1975, paragraph 2, which provides:

That the licensee shall maintain and keep in good repair and condition the premises herein authorized to be used, and all costs of operation, maintenance, and restoration occasioned by reason of the occupancy of the premises by the licensee shall be paid for from funds available to the licensee, or from funds other than those appropriated for the [USAF].

As the license agreement makes clear, the USAF did not assume any responsibility for the safety of HIANG's employees, and to the contrary, the parties expressly agreed that the USAF would not assume such liability, as evidenced in ¶ 4 of the USAF-HIANG license agreement (U.S. Exh. A), which provides in pertinent part:

That the Government will not be responsible for any injury to persons or damage to property arising out of or incident to the use or occupancy of the licensed property by the licensee, however such injury or damage may be caused, and the licensee shall indemnify and save the Government harmless from any and all claims for any such injury or damage

Thus, responsibility for providing a safe workplace for Hawaii state employees rested with the state, and not the federal government. As the following discussion of the HIANG's asbestos management program for the facilities at Hickam AFB shows, the HIANG understood and complied with this mandate.

C. The HIANG Asbestos Management Program at Hickam AFB

As the documents provided to the Plaintiffs demonstrate, the state of Hawaii and the HIANG assumed the responsibilities as set forth in the 1975 facilities license agreement executed by the USAF and HIANG. Of relevance here, the HIANG developed and implemented an asbestos management program that

1 covered the buildings at Hickam AFB licensed to the HIANG. See U.S. Exh. E,
 2 “Asbestos Management Program, Hawaii Air National Guard, Hickam Air Force
 3 Base, Hawaii,” USAF 01-00586-00619; 01-00644-00662.³

4 The HIANG Asbestos Management Program was prepared by the Air
 5 National Guard Civil Engineering Technical Services Center, Minot, North
 6 Dakota, and was issued in early 1992. The program expressly identifies, and
 7 applies to, all of the buildings alleged in the Mr. Byington complaint as containing
 8 asbestos. A survey of the licensed buildings was made in January 1992, and the
 9 program was established in accordance with Air Force Regulation 91-42, Air Force
 10 Facility Asbestos Management. As stated therein, “[t]he base asbestos
 11 management program consists of an asbestos management plan (AMP) and an
 12 asbestos operating plan (AOP). This report contains an AMP and an AOP which
 13 have been developed for Hickam ANG base and its [geographically separated
 14 units] and are consistent with AFR 91-42.” U.S. Exh. E at 1, ¶ 1.1 (emphasis
 15 added). Under the heading of “Objectives,” the report states that the “overall
 16 objective of the asbestos management program is to ensure that the health and
 17 welfare of all base personnel are protected from the potentially harmful effects of
 18 asbestos containing material.” *Id.* at ¶ 1.2 (emphasis added). The plain meaning of
 19 this objective is that the state correctly took responsibility for the health and
 20 welfare of its employees, including that of providing a safe workplace.

21 While the details of the state’s asbestos management program are not
 22 relevant here (the state has not been sued by Mr. Byington), the report and program
 23 set forth in substantial detail the duties and responsibilities undertaken by the
 24 HIANG for the buildings under its control at Hickam AFB. Addressing
 25 asbestos containing materials (ACM), the report states that “[i]t is the intention of
 26

27 ³ The index to the report indicates 45 pages of text. The gaps and blank pages in the
 28 bates-numbered documents appear to be an error in copying.

1 the Air Guard to remove ACM whenever it is opportune to do so, whenever it is a
2 potential threat to personnel health, and as necessary to comply with applicable
3 regulations.” *Id.* (emphasis added). Monitoring and surveillance of friable
4 asbestos are also addressed in the plan, which states that “[a]ll locations with
5 friable asbestos will be monitored on an on-going basis to ensure that the ACM
6 does not become damaged or deteriorate and pose a risk of exposure to base
7 personnel.” *Id.* at p. 29, ¶ 2.4. With respect to any duty to warn state employees
8 such as Mr. Byington of the dangers of asbestos, the HIANG states that:

9 The general base population should have a good understanding of the
10 potential asbestos health hazards. They also need to understand that
11 undamaged asbestos in good condition poses no inherent hazard. The APO
12 will attempt to increase general base knowledge and awareness of asbestos
13 concerns by disseminating general information to the base population using
14 appropriate base procedures.

15 *Id.* at p. 30, ¶ 2.6. Clearly, any responsibility to inform Mr. Byington about the
16 presence of asbestos in the licensed facilities, and the duty to address any dangers
17 posed by the asbestos in those buildings, rested solely with the HIANG.

18 While the document clearly addresses the question of allocation of duty and
19 responsibility vis-a-vis the Air Force and HIANG, the declaration of Colonel
20 Michael Compton of the HIANG (U.S. Exh. F) provides further explication of the
21 relationship. Colonel Compton was the HIANG’s Environmental Coordinator in
22 1992, and had additional duty as the Asbestos Program Officer pursuant to the
23 Asbestos Management Plan. *See* U.S. Exh. E at p. 3. As Colonel Compton
24 explains, prior to 1992, there was no requirement for the HIANG to have a formal
25 program to address asbestos, although “the HIANG actively monitored and tested
26 its facilities for asbestos” prior to 1992. *Id.* at 1, ¶ 5. Referencing the HIANG
27 Asbestos Management Plan, Colonel Compton explained that “the HIANG was
28 responsible for state worker health and safety while working in the HIANG
facilities.” *Id.* In addition, Colonel Compton states that the HIANG provided
notice to state employees on the presence of asbestos in HIANG facilities, and also

provided training on asbestos safety. Id. Colonel Compton further states that the HIANG monitored and tested the air in the buildings where Mr. Byington worked. Id. at p. 2, ¶ 6-7. Of all the tests taken, Colonel Compton advised that he was “not aware of any that ever exceeded, or even came close to exceeding, federal or state maximum contaminant levels.” Id. at ¶ 7.

In sum, during the period alleged in Mr. Byington’s complaint, from 1989 to 1993, the HIANG was responsible for managing any asbestos in the buildings occupied by the HIANG, for the health and safety of its employees, and for warning its employees, such as Mr. Byington, of any dangers posed by the presence of asbestos. There is no evidence that the United States had, or assumed, any correlative duties.

ISSUE PRESENTED

Does the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a) require dismissal of this lawsuit because the Air Force’s decision to delegate building maintenance responsibilities to its licensee, the Hawaii Air National Guard, State of Hawaii, was discretionary and susceptible to economic, social, and political policy considerations?

ARGUMENT

DISMISSAL, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT, IS WARRANTED BECAUSE THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT DEPRIVES THIS COURT OF JURISDICTION

I. STANDARD OF REVIEW

This motion is directed to the Court's jurisdiction, and thus is properly styled as a motion to dismiss under Fed. R. Civ. P. 12(b)(1). An issue of subject matter jurisdiction is properly decided under Fed. R. Civ. P. 12(b)(1). See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988). Subject matter jurisdiction is a threshold issue, and the separation of powers doctrine requires a federal court to determine whether it has jurisdiction at the outset, rather than to defer the issue

1 until trial. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95
2 (1998).

3 In ruling on a motion to dismiss under Rule 12(b)(1), "no presumptive
4 truthfulness attaches to the plaintiff's allegations." Mortensen v. First Federal
5 Savings and Loan Association, 549 F.2d 884, 891 (3d Cir. 1977); accord, St. Clair
6 v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). As further explained in White
7 v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000), the court is not limited to the
8 pleadings, but may, in deciding a Rule 12(b)(1) dismissal motion, "look beyond the
9 complaint" without converting the motion into one for summary judgment) (citing
10 2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.30[4], at 12-39 (3d ed.
11 1999)).

12 In the Ninth Circuit, the United States bears the initial burden of proving the
13 applicability of the discretionary function exception to the FTCA's general waiver
14 of immunity. Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir. 1995) (citing
15 Prescott v. United States, 973 F.2d 696, 701-702 (9th Cir. 1992)). In the instant
16 case, the United States meets the Prescott burden through the arguments below and
17 the appended evidence, which together justify dismissal under Rule 12(b)(1).
18 Nevertheless, the government also seeks Rule 56 summary judgment in the
19 alternative.

20 Under Fed. R. Civ. P. 56(c), summary judgment should be granted where
21 there are no genuine issues of material fact and the moving party is entitled to
22 judgment as a matter of law. Summary judgment is proper against a party who
23 fails to make a showing sufficient to establish the existence of an element essential
24 to that party's case and on which that party will bear the burden of proof at trial.
25 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Matsushita Electric Industrial
26 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Anderson v. Liberty Lobby,
27 477 U.S. 242 (1986).
28

1 The moving party has the initial burden of showing the absence of a genuine
 2 issue of material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).
 3 "Although the moving party has the initial burden of demonstrating that summary
 4 judgment is proper, that burden may be discharged by pointing out to the court an
 5 absence of facts to support the nonmoving party's case." McLandrich v. Southern
 6 California Edison Co., 942 F. Supp. 457, 461 (S.D. Cal. 1996). The United States,
 7 as the moving party, "is not required to produce evidence showing the absence of a
 8 genuine issue of material fact on such issues, nor must the moving party support its
 9 motion with evidence negating the nonmoving party's claim." Id. The non-
 10 moving party is required to go beyond the pleadings and by its own affidavits,
 11 depositions, answers to interrogatories, and admissions on file, designate specific
 12 facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324
 13 (emphasis added).

14 Plaintiffs must do more than "simply show that there is some metaphysical
 15 doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving
 16 party's burden on summary judgment is the evidentiary standard which the party
 17 must satisfy at trial. Anderson v. Liberty Lobby, 477 U.S. at 255. The United
 18 States, moreover, does not have to prove that Plaintiffs' case is "wholly frivolous."
 19 Burke v. Jacoby, 981 F.2d 1372, 1379 (2d Cir. 1992). As we show below, the
 20 United States' assertion of its jurisdictional defenses meets the initial burden
 21 established by Prescott, and the standards of both Rule 12(b)(1) and Rule 56.

22 **II. THE LAW UNDER THE FEDERAL TORT CLAIMS ACT**

23 **A. Federal Tort Claims Act**

24 The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680,
 25 under which Plaintiffs bring suit, is a limited waiver of sovereign immunity.
 26 United States v. Idaho, 508 U.S. 1, 6-7 (1993). The FTCA provides the exclusive
 27 and limited waiver of sovereign immunity for money damage suits against the
 28

1 United States that sound in non-maritime tort. 28 U.S.C. §§ 2674, 2679(b)(1).
 2 The consent of the United States to be sued cannot be implied, but must be
 3 unequivocally expressed and strictly construed. United States v. Nordic Village,
 4 Inc., 503 U.S. 30, 34-35 (1992). Because the federal government "can be sued
 5 only to the extent that it has waived its immunity, due regard must be given to the
 6 [Act's] exceptions." United States v. Orleans, 425 U.S. 807, 814 (1976). Thus,
 7 waivers of sovereign immunity are to be strictly construed, United States v. Trident
 8 Seafoods Corp., 92 F.3d 855, 864 (9th Cir.1996), and "the court must construe any
 9 ambiguities in favor of immunity." United States v. Williams, 514 U.S. 527, 531
 10 (1995).

11 If asserted liability under the FTCA falls within an exception, the claims
 12 must be dismissed, because failure of a claim to satisfy the standards of the FTCA
 13 means that the court lacks subject matter jurisdiction. See Borquez v. United
 14 States, 773 F.2d 1050, 1052 (9th Cir. 1985).

15 **B. The Discretionary Function Exception Of The FTCA**

16 The discretionary function exception of the FTCA insulates from tort suit
 17 governmental actions and decisions grounded in considerations of public policy.
 18 United States v. Gaubert, 499 U.S. 315, 325 (1991).

19 Section 2680(a) of the FTCA states the exception, providing that the United
 20 States does not waive its sovereign immunity for "[a]ny claim . . . based upon the
 21 exercise or performance or the failure to exercise or perform a discretionary
 22 function or duty on the part of a federal agency or an employee of the Government,
 23 whether or not the discretion involved be abused."

24 The Supreme Court has articulated a two-pronged test to determine the
 25 applicability of the discretionary function exception: (1) whether the alleged
 26 wrongful government conduct violated a specific and mandatory regulation or
 27 statute, and thus the government lacked discretion; and (2) if not, whether the
 28 governmental action challenged was susceptible to being based upon social,

1 economic, or political policy considerations. See United States v. Gaubert, 499
2 U.S. at 325; National Union Fire Ins. v. United States, 115 F.3d 1415, 1419-20
3 (9th Cir. 1997).

4 In Gaubert, the Supreme Court defined the contours of whether the activity
5 at issue is susceptible of being based on social, economic, or political policy.
6 Plaintiff there sought recovery from the United States for damages allegedly
7 resulting from the Federal Home Loan Bank Board's mismanagement of a bank. Id.
8 at 319-20. Rejecting the argument that only high level planning or policy
9 decisions were exempt from liability under the discretionary function exception,
10 the Court held that day-to-day activities at the operational level are immune from
11 liability if the activities involved are grounded in policy considerations. Id. at 325.

12 The Court further explained that the government need not demonstrate that
13 each challenged action is rooted in a social, economic or political policy
14 consideration. Rather, the Court held that, when statutes, regulations, or guidelines
15 allow a government agent to exercise discretion, "it must be presumed that the
16 agent's acts are grounded in policy when exercising that discretion." Id. at 324.
17 Finally, the Court instructed that the "focus is not on the agent's subjective intent . .
18 ., but on the nature of the actions taken and on whether they are susceptible to
19 policy analysis." Id. at 325 (emphasis added); Lesoeur v. United States, 21 F.3d
20 965, 967-68 (9th Cir. 1994) (government need only prove that the decision is
21 subject to policy analysis, not that it actually balanced factors); Kennewick
22 Irrigation District v. United States, 880 F.2d 1018, 1028 (9th Cir. 1989)(rejecting
23 the argument that "the discretionary function exception cannot apply in the absence
24 of a 'conscious decision'"). Thus, there is no need to point to a specific government
25 decision in applying the two-pronged test; if the questioned activity is one capable
26 of analysis based upon social, economic or political considerations (susceptible of
27 policy analysis), it falls within the exception, whether or not the agency actually
28 engaged in the analysis.

III. THE UNDISPUTABLE FACTS IN THIS MATTER COMPEL THE CONCLUSION THAT THE DISCRETIONARY FUNCTION EXCEPTION BARS THE SUIT

The discretionary function exception analysis set forth by the Supreme Court requires that the Court examine the government's role in the instant case to determine if the challenged governmental conduct was constrained by a mandatory and specific statute or regulation that the government violated, and if not, whether the conduct at issue was susceptible to policy judgment. Here, the government's decision to license various buildings at Hickam AFB to the HIANG, and to leave maintenance of those buildings to the HIANG, did not involve violations of self-imposed mandatory and specific obligations and plainly was grounded in policy decisions of the type that Congress intended to shield from tort liability.

For Plaintiffs to proceed with their suit against the United States, the record must show that the relevant actions of the government violated mandatory and specific constraints that it had imposed on itself, or were not rooted in policy.⁴ A showing of governmental negligence is both insufficient and irrelevant for purposes of this analysis.⁵ Nevertheless, we look to the Plaintiffs' complaint to determine whether their allegations of negligence can form a basis for federal liability under the jurisdictional analysis.

⁴ The Ninth Circuit has made it clear that a mandatory obligation must also be specific to defeat the first prong of this analysis. See Kennewick, 880 F.2d at 1027; Blackburn v. United States, 100 F.3d 1426, 1430 (9th Cir. 1996). Moreover, "the presence of a few, isolated mandatory provisions does not transform an otherwise suggestive set of guidelines into binding agency regulations." Sabow v. United States, 93 F.3d 1445 (9th Cir. 1996).

⁵ Whether Plaintiffs seek recovery under a theory of direct liability or vicarious liability is immaterial as a matter of law. The basis for liability, including state law doctrines, is irrelevant to jurisdictional analysis where it simply states alternate theories of negligence. Negligence is irrelevant to determining the applicability of the discretionary function exception. In Re Glacier Bay, 71 F.3d 1447, 1451 (9th Cir. 1995); Routh v. United States, 941 F.2d 853, 855 (9th Cir. 1991) ("[i]ssues of negligence are irrelevant to the discretionary function inquiry") (emphasis added); In re Consolidated U. S. Atmospheric Testing, 820 F.2d 982, 996 (9th Cir. 1987). The issue of negligence is reached only if the jurisdictional exceptions are found inapplicable. Similarly, any theory of recovery based on strict liability is proscribed under the FTCA. The FTCA does not allow for recovery based on any form of strict liability. See Laird v. Nelms, 406 U.S. 797, 798-99 (1972); Dalehite v. United States, 346 U.S. 15, 30-31, (1953); Bramer v. United States, 595 F. 2d 1141, 1144 & n.7 (9th Cir. 1979).

Plaintiffs' complaint asserts government liability based on an allegation that the United States "carelessly and negligently permitted dangerous and defective asbestos products to exist at the hereinabove described locations; and furthermore, Defendant negligently failed to provide Decedent JIMMY F. BYINGTON a safe place of employment by reason of its acts, omissions and conduct." Compl. at ¶ 8. As set forth, these allegations of federal negligence must fail, because any duty to address asbestos in Mr. Byington's workplace, and to provide a safe workplace, rested not with the United States, but rather, with the state of Hawaii and the HIANG. In cases involving alleged negligent activity in the context of government delegation of tasks to private contractors, the only way the discretionary function exception may be overcome is if the government has imposed upon itself mandatory and specific duties, which it (as opposed to its contractor or a third-party such as the HIANG) then fails to follow. In this context, and although not asserted here, the discretionary function exception would also bar claims such as that the government negligently failed to supervise the HIANG's duty to comply with applicable statutes, guidelines, or regulations, as set forth in the license agreement.

A. The United States Did Not Violate Any Self-Imposed Mandatory and Specific Obligations

The sole issue with respect to the first prong of the analysis is whether the United States had discretion to license the facilities to the HIANG, leaving responsibility for safe building maintenance with the HIANG. The Air Force's decision to license facilities to the HIANG was expressly authorized by statute and Air Force regulations. Air Force Instruction 32-9003, titled *Granting Temporary Use of Air Force Property* (copy attached as U.S. Exh. G), specifically authorizes the Air Force to license real property to, among others, the Air National Guard. See U.S. Exh. G at p. 17, ¶ 3.5. This instruction identifies 32 U.S.C. §503 as the statutory authority for such licensing agreements. Nothing in either the statute or

1 the Air Force instruction, and its predecessor regulation, AFR 87-3, prevents the
2 Air Force from delegating all building maintenance responsibility to a licensee.

3 This Court's decision in Tyni v. United States, No. 99-00907 HG-KSC,
4 dated November 7, 2001 (copy attached as U.S. Exh. H), is instructive. In Tyni,
5 plaintiff brought suit against the United States for injuries suffered while removing
6 lead-based paint at Hickam AFB. Plaintiff was employed by a government
7 subcontractor. As in this case, the agreement between the government and
8 plaintiff's employer allocated responsibility for health and safety to a non-federal
9 entity, with no retained responsibilities for the government. The United States
10 raised, inter alia, the discretionary function exception of the FTCA as a bar to
11 Plaintiffs' claims. In granting summary judgment for the government, this Court
12 held that the decision to delegate safety matters to its contractor was not proscribed
13 by a mandatory and specific requirement and was a matter of protected policy, Id.
14 at pp. 22-26. Accordingly, this Court found that the discretionary function
15 exception barred Plaintiff's negligence claim. Just as in Tyni, the government's
16 decision here, in its contract with the HIANG, to require the HIANG to take
17 responsibility for maintenance and environmental and safety compliance is
18 consistent with similar cases holding such choices to be within the discretionary
19 function exception. See e.g., Andrews v. United States, 121 F.3d 1430, 1440 (11th
20 Cir. 1997)("The law is clear that the government may delegate its safety
21 responsibilities to independent contractors in the absence of federal laws or
22 policies restricting it from doing so;" "the discretionary function exception
23 encompasses government decisions about how and how much to supervise the
24 safety procedures of independent contractors").

25 Thus, the first prong of the Supreme Court's test for determining the
26 applicability of the discretionary function exception is met in this case because
27 there were no applicable statutes or regulations that prohibited the United States
28 from licensing the facilities to the HIANG, or by the terms of the license,

1 allocating responsibility for maintenance and safety issues to the HIANG at
2 Hickam AFB.

3 **B. The United States' Actions Were Susceptible Of Policy**
4 **Considerations**

5 The second prong of the Supreme Court's discretionary function analysis test
6 is met because the government's decision to delegate responsibility for
7 maintenance of the Hickam AFB facilities licensed to the HIANG was based on,
8 and susceptible of being based on, policy considerations of the type that Congress
9 intended to shield from judicial review. Indeed, the Ninth Circuit has held that the
10 exception applies whenever an agency must "balance[] competing policy
11 concerns." Gager v. United States, 149 F.3d 918, 921 (9th Cir. 1998); see also,
12 Phoenix Baptist Hospital v. United States, 937 F.2d 452, 453 (9th Cir. 1991)(after
13 finding discretion, "we presume that the decision . . . is grounded in matters of
14 policy.").

15 As noted above, the government's decision to license the facilities to the
16 HIANG was expressly authorized by both statute and regulation. As the Supreme
17 Court instructed in Gaubert, when statutes, regulations, or guidelines allow a
18 government agent to exercise discretion, "it must be presumed that the agent's acts
19 are grounded in policy when exercising that discretion." 499 U.S. at 324. That
20 presumption should be dispositive here.

21 Here, the United States made the decision to allow the HIANG to use a
22 portion of the Hickam AFB facility. This decision to engage in intergovernmental
23 cooperation on matters involving the protection of the public plainly was policy-
24 based. Similarly, the decision to permit this use at no direct cost to the state of
25 Hawaii was also susceptible to policy analysis, and indeed, must be presumed to be
26 policy based because it was authorized, and based on, statutory authority. See
27 Gaubert, 499 U.S. at 324. Finally, the decision to delegate to the State of Hawaii
28 all responsibilities for the upkeep of the licensed facilities was susceptible to policy

1 analysis.

2 To the extent that Plaintiffs' complaint is read as a challenge to the United
3 States' decision, in the licensing agreement, to allocate or delegate responsibility
4 for the condition of the licensed premises to the HIANG, that decision is exempt
5 from judicial review because the discretionary function exception to the FTCA
6 bars such allegations. It is well established that the United States' decision to
7 delegate tasks to parties with whom it contracts, as it did with the HIANG in the
8 instant case, is protected by the discretionary function exception.⁶

9 Nor can it be argued that any alleged failure to oversee the HIANG's
10 maintenance and safety efforts can be the subject of an FTCA action. Decisions of
11 the federal government in allocating responsibility for, e.g., maintenance, health,
12 and safety matters to contractors and third-parties, have long been held to be
13 protected policy-based decisions. See Kirchmann v. United States, 8 F.3d 1273,
14 1277-78 (8th Cir. 1993)("If arguably based on policy considerations, both
15 negligence in supervising a contractor and the failure to supervise a contractor at
16 all are included in the decisions protected by the discretionary function
17 exception."); In re Consolidated U.S. Atmospheric Testing, 820 F.2d at 982, 995-
18 96 (9th Cir. 1987); Duff v. United States, 999 F.2d 1280, 1281 (8th Cir. 1993)
19 (decision to delegate safety issues to contractor based on policy because the United
20 States was entitled "to take advantage of a contractor's special expertise, thereby
21 creating the opportunity for a safer, more efficient operation"); Layton v. United
22 States, 984 F.2d 1496, 1502-03 (8th Cir. 1993) (delegation of safety responsibility
23 to contractor falls within discretionary function exception); Totten v. United States,

24
25 ⁶ See In re Consolidated U.S. Atmospheric Testing, 820 F.2d at 995-96; Domme v. United
26 States, 61 F.3d 787, 791 (10th Cir. 1995); Kane v. United States, 15 F.3d 87, 89 (8th Cir. 1994); Duff v.
27 United States, 999 F.2d 1280, 1281-82 (8th Cir. 1993); Layton v. United States, 984 F.2d 1496, 1501-02
28 (8th Cir.); Shuman v. United States, 765 F.2d 283, 291-95 (1st Cir. 1985); McMichael v. United States,
751 F.2d 303, 307 (8th Cir. 1985) ("[deciding to award a government defense contract to a particular
[contractor] involves weighing various facts and policies and this is discretionary in nature"); Feyers v.
United States, 749 F.2d 1222, 1226-27 (6th Cir. 1984); Hagy v. United States, 976 F. Supp. 1373, 1378
(W.D. Wash. 1997).

1 806 F.2d 698, 701 (6th Cir. 1986); Shuman v. United States, 765 F.2d 283, 291-95
 2 (1st Cir. 1985)(in shipyard worker mesothelioma case, government action in
 3 leaving safety and health to contractor protected); Feyers v. United States, 749
 4 F.2d 1222, 1226-27 (6th Cir. 1984) (allegation that government breached
 5 nondelegable duty to provide safe workplace to contractor employee barred by
 6 discretionary function exception); Hagy v. United States, 976 F. Supp. 1373, 1378
 7 (W.D. Wash. 1997) ("In light of such practical considerations, an agency may
 8 determine that operational safety will be enhanced through reliance on the
 9 contractor's special expertise."); Jones v. United States, 698 F. Supp. 826, 833 (D.
 10 Hawaii 1988)(Air Force decision to give independent contractor "primary
 11 responsibility for safety in pest control, while only retaining oversight authority, is
 12 protected by the discretionary function exception.").

13 The government's delegation of safety responsibilities to tenants, through
 14 lease agreements, is precisely the kind of discretionary decision that gives rise to a
 15 "strong presumption" that the decision was grounded in public policy. See
 16 Gaubert, 499 U.S. at 324. See also Vallier v. Jet Propulsion Laboratory, 120 F.
 17 Supp. 2d 887, 913-14 (C.D. Cal. 2000), Hagy, 976 F. Supp. at 1378-79.

18 Plaintiffs' attempt to use the FTCA here as a basis for federal liability is an
 19 effort to do what Congress intended to prevent by enacting the discretionary
 20 function exception: "judicial 'second-guessing' of . . . administrative decisions
 21 grounded in social, economic, and political policy through the medium of an action
 22 in tort." Varig Airlines, 467 U.S. at 814; Kennewick Irr. Dist. v. United States, 880
 23 F.2d at 1028; In re Consolidated U.S. Atmospheric Testing, 820 F.2d at 995-96;
 24 Domme v. United States, 61 F.3d at 791; Kirchmann v. United States, 8 F.3d at
 25 1277-78; Totten v. United States, 806 F.2d at 701-02; Shuman v. United States,
 26 765 F.2d at 291-95.

27 Finally, we note that any suggestion that this case may proceed because the
 28 United States had a non-delegable duty under state law with respect to the licensed

1 premises must fail. As noted supra, p. 12 n. 5, issues of duty established by state
2 law are only relevant if the court first determines that it has jurisdiction, and that
3 the discretionary function exception does not apply. See In re Consolidated U. S.
4 Atmospheric Testing, 820 F.2d 982, 996 (9th Cir. 1987), where the plaintiffs
5 sought to avoid the discretionary function exception by citing to Gardner v. United
6 States, 780 F.2d 835, 837 (9th Cir. 1986). The Ninth Circuit rejected plaintiffs'
7 argument, noting that in Gardner the "discretionary function exception was not
8 raised or discussed." 820 F.2d at 996. The Ninth Circuit went on to explain that it
9 "is irrelevant to the discretion issue whether [the government] or its employees
10 were negligent in failing to adequately protect the public" and that when "an
11 agency determines the extent to which it will supervise the safety procedures of
12 private individuals, it is exercising discretionary regulatory authority of the most
13 basic kind" (id.), quoting, first, Allen v. United States, 816 F.2d 1417 (10th Cir.
14 1987), and, second, Varig Airlines, 467 U.S. at 819. In other words, while state law
15 doctrines of non-delegable duty may enable a plaintiff to overcome the
16 government's assertion of the independent contractor defense where the
17 government has delegated responsibilities to its contractor, such state law doctrines
18 are irrelevant to discretionary function exception analysis when the government
19 has chosen to delegate the relevant responsibilities to the contractor.

20 This Court in Tyni reached the same conclusion as was reached in the cases
21 noted above, in finding that Plaintiff's theories of government liability under
22 Hawaii state law were not relevant. See Tyni, U.S. Exh. H, at pp. 29-32. As stated
23 in Tyni, if a court finds that an action is barred by the discretionary function
24 exception, "the Court does not have subject matter jurisdiction to reach the merits
25 of Plaintiff's state law theories." Id. at p. 30. In the absence of a self-imposed,
26 mandatory and specific federal obligation barring such delegation, the
27 discretionary function exception insulates such delegations from tort suit. No such
28 obligation exists here.

IV. CONCLUSION

This is a case where Plaintiffs are attempting to impose duties on the United States that were left solely, as a matter of policy-based discretion, with the HIANG. The USAF leased, through a licensing agreement, a number of buildings at Hickam AFB to the HIANG during the time that Plaintiffs allege that Mr. Byington was exposed to the asbestos. The HIANG, by the express provisions of the licensing agreement, assumed responsibility for maintaining the facilities, complying with applicable regulations, and ensuring the safety of its own employees, such as Mr. Byington. There is simply no basis for imposing liability on the United States in such a case. For the foregoing reasons, this tort action should be dismissed for lack of subject matter jurisdiction, or in the alternative, summary judgment should be granted.

Pursuant to Local Rule of Court 7.5(e), for the United States District Court for the District of Hawaii, I hereby certify that this notice and memorandum do not exceed either the page or word limits of the rule.

DATED: September 26, 2006.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

C. FREDERICK BECKNER, III
Deputy Assistant Attorney General
Civil Division

J. PATRICK GLYNN
Director, Torts Branch

DAVID S. FISHBACK,
Assistant Director
Environmental Torts Section
Civil Division

EDWARD H. KUBO, JR.
United States Attorney

R. MICHAEL BURKE
Assistant U.S. Attorney

/s/ R. MICHAEL BURKE

STEVEN TALSON
Senior Trial Counsel
TIMOTHY B. WALTHALL
Trial Attorney
Environmental Torts
Civil Division
U.S. Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

IN RE
HAWAII FEDERAL ASBESTOS
CASES

CIVIL NO. 04-00661 REJ-BMK
CERTIFICATE OF SERVICE

This Document Applies To:

MERCY S. BYINGTON, individually
and as Personal Representative of the
Estate of JIMMY F. BYINGTON,
deceased, EVELINE SHORT, and
BEVERLY ANN HAUOLI ANI, as
Prochein Ami for MARGARET
BARBARA HA'EIHA'E ANI, a
minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the method of service noted
below, a true and correct copy of the foregoing was served on the following at
their last known addresses:

Served Electronically through CM/ECF:

L. Richard DeRobertis rd@gogaliher.com
September 26, 2006

Jeffrey T. Ono jto@gogaliher.com
September 26, 2006

Served by First-Class Mail:

Gary O. Galiher, Esq. September 26, 2006
610 Ward Avenue
Second Floor
Honolulu, Hawaii 96814

DATED: September 26, 2006, at Honolulu, Hawaii.
/s/ Myra Y. Peterson